

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISCELLANEOUS CIVIL CAUSE NO. 4 OF 2022

**IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR AN ORDER
OF CERTIORARI AND MANDAMUS AGAINST THE DECISION OF THE DISTRICT
COUNCIL OF MOMBA, DATED 17TH JANUARY, 2022 AGAINST**

AND

IN THE MATTER OF THE VILLAGE LANDACT CAP 114 R: E 2019

AND

**IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENTS AND
MISCELLANEOUS PROVISIONS) ACT, CAP 310 R: E 2019**

BETWEEN

ELLY LUNANILO MKOLAAPPLICANT

VERSUS

THE DISTRICT EXECUTIVE DIRECTOR OF MOMBA1ST RESPONDENT

THE DISTRICT COUNCIL OF MOMBA2ND RESPONDENT

THE VILLAGE COUNCIL OF NYENJELE3RD RESPONDENT

THE HON. ATTORNEY GENERAL4TH RESPONDENT

RULING

Date of last order: 10th June, 2022

Date of ruling: 5th July, 2022

NGUNYALE J.

This ruling emanated from preliminary objection filed by the respondents. The applicant has filed this application for leave to lodge application for judicia review remedies of mandamus and certiorari. The application is brought under section 46 (1) (2) (5) of the Village Land Act

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[Cap 114 R: E 2019], section 17 (1) (2) (3) (4) and 19 (1) (2) (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [Cap 310 R: E 2019] and Rule 8(a) (2) (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 (herein referred as Rules). It is supported by an affidavit sworn by the applicant. The application is resisted by the respondents through counter affidavit sworn by Joseph Tibaijuka, learned State Attorney. In addition, the application was confronted with a preliminary objection on a point of law challenging its competence on ground that

- i. The affidavit is incurable defective as it contains hearsay evidence, argumentative, narrative and conclusive evidence contrary to law.*
- ii. The application does not contain paragraph showing name and description of the applicant.*

At the hearing the applicant was represented by Mis. Grolia Simpassa learned advocate while the respondents were represented by Joseph Tibaijuka learned State Attorney. The preliminary objection was heard by way of written submission.


In his submission Mr. Tibaijuka submitted that paragraphs 10.0, 11.0 and 12.0 of the applicant's affidavit in support of the application is defective for containing opinion and hearsay evidence which came from



his advocate Grolia Simpassa and there is no affidavit of the said counsel contrary to Order XIX Rule 3(1)(2) of the Civil Procedure Code [Cap 33 R: E 2019]. To support her argument, he cited the case of **Uganda v. Commissioner of Prison Exparte Matovu** [1966] E.A 514. Mr. Tibaijuka added that the remedy is to expunge the offending paragraphs. It was further submission that in absence of the advocate's affidavit the averment in the applicant's affidavit remain hearsay.

Regarding the third objection it was submitted that the application offends rule 5 (2) (a) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules of 2014 for not being accompanied with the statement of names and description of the applicant. It was further submission that failure to disclose names and description of the applicant is fatal and makes the application incompetent. He cited case of **the Registered Trustees of Democratic Party v The Registrar of Political Parties & Another**, Misc. Civil Cause No 92 of 2014 HC at Dar es Salaam to support the argument.

In rebuttal Mis. Simpassa on affidavit containing hearsay submitted that the applicant has disclosed in the verification clause facts which are from his personal knowledge and those advised by his counsel. Regarding



advocate who gave advice not swearing the affidavit it was Mis Simpassa's reply that it is not always that where information is obtained from a third party must swear the affidavit. She relied on the case of **Unyangala Enterprises Ltd & 5 Others v Stanbic Bank (T) Ltd**, Civil Application No. 56 of 2006.

In alternative Mis. Simpassa submitted that should the court find paragraph 10.0, 11.0 and 12.0 of the affidavit hearsay, per decision of **Phantom Modern Transport (1985) Ltd v. DT Dobie (TZ) Ltd**, Civil References Nos. 15 the said paragraphs can be expunged or overlooked leaving the sustentative part of the affidavit intact.

Regarding whether the application is accompanied by statement of the name and description of the applicant Mis. Simpassa submitted that it is disclosed at the particulars of the applicant in the affidavit. She added that the Rules does not prescribe how the statement should be written. The case of **The Registered Trustees of Democratic Party** was distinguished with the present facts of the case to which I so agree.

Alternatively, Mis. Simpassa implored the court to invoke overriding objective principles should it find the statement is important. To bolster the point, she cited the case of **Mgambazi Mines Company Limited v**



Kidee Mining (T) Limited, Civil Appeal No. 238 of 2019. CAT (Unreported).

I have perused records of the application and considered rival submission. The legal position is now settled that an affidavit which is to be used as evidence before the court should not contain extraneous matters but facts only. The general rule of practice and procedure on affidavits was stated in **Uganda v. Commissioner of Prison Exparte Matovu** [1966] E.A 574 and was restated in **Phantom Modern Transport (1985) Ltd v. DT Dobie (TZ) Ltd**, Civil References Nos. 15 of 2001 and 3 of 2002 (unreported) as follows;

'As a general rule of practice and procedure on affidavit for use in Court being a substitute for oral evidence, it should only contain statement to which the witness disposes either of his own knowledge or such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion.'

Mr. Tibaijuka submitted that paragraph 10.0, 11.0, and 12.0 of the affidavit contain hearsay without more while the applicant counsel replied that source of information is disclosed in the affidavit. In this application the deponent has verified information which came from his advocate to which he believes to be true which is allowable by the law. With respect to Mr. Tibaijuka's submission it is not in every circumstance that whenever information in an affidavit is based on information of another person, that



person should also depone to that effect. The deponent has clearly disclosed in the verification clause which facts are true based on his knowledge and those based on his belief. Therefore, the objection is baseless.

In the second objection it was submitted that the applicant has omitted to included description in the affidavit while the applicant was of the view that the description has been shown in the introductory part of the affidavit. I have weighed rival arguments as against the law, rule 5(2)(a) of the Rules reads;

5(2) An application for leave under sub-rule (1) shall be made ex parte to a judge in chambers and be accompanied by-

(a) a statement providing for the name and description of the applicant;

(b) the relief sought;

(c) the grounds on which the relief is sought; and

(d) affidavits verifying the facts relied on.

The law provides four documents to accompany the application. In this application the application is accompanied only by the affidavit of the applicant without any other documents listed under rule 5(2)(a) of the Rules. For clarity application for leave has to be substantially in 'FORM A' found at the first schedule to the Rules. After the orders sought in 'FORM A' provides as follows;



This application is brought at the instance of and is supported by the statement of the applicant and the affidavit(s) of

Reading the entire Rules it gives wider understanding as to what the statement is meant. For instance, rule 8(1)(a) of the Rules provides;

'8 (1) where a leave to apply for judicial review has been granted, the application shall be made:-

(a) by way of chamber summons supported by an affidavit and the statement in respect of which leave was granted.'

From my understanding leave is not granted on the averments found in the affidavit rather statement in which reliefs and ground upon which reliefs is sought will have to be enunciated. The purpose of the affidavit to the application for leave to file application for judicial review is to verify facts relied on.

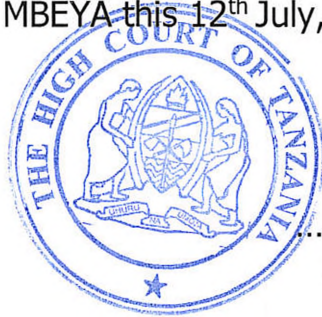
In the instance matter the application filed by the applicant is accompanied only by the affidavit which as I have demonstrated above has omitted to include the important document statement thereby rendering the application incompetent. I am persuaded by the judgment of this court in the case of **Miza Bakari Haji & 7 Others v the Clerk of the National Assembly & 9 Others**, Misc. Civil Application No. 8 of 2018, HC at Dar es Salaam (Unreported) where Mwandambo, J as he then was, where he held that;

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'... In the circumstances, since the application is not accompanied by a statement as required by Rule 5 (2)(a) of the Rules read together with form 'A' of the schedule to the Rules, I would agree with Mr. Ngole, learned Advocate that the omission is fatal rendering the application incompetent....'

Above said I find the second preliminary objection raised meritorious and do hereby strike out the application for being incompetent. Given that the application was supposed to be heard *ex-parte* though the respondents were served I make no order as to costs.

DATED at MBEYA this 12th July, 2022



A handwritten signature in blue ink, appearing to read "D.P. Ngunyale", is written over a horizontal dotted line.

D.P. Ngunyale
Judge